CARES Act Summary

March 31, 2020

In the late afternoon of March 27, 2020, President Trump signed the Coronavirus Aid, Relief and Economic Security Act (CARES Act). This legislation provides $2.2 trillion in federal funding intended to stimulate the economy due to layoffs and other economic consequences of the COVID-19 pandemic. The CARES Act follows on the heels of the Families First Coronavirus Response Act (FFCRA) which provided expanded paid leave provisions in light of COVID-19. We previously provided a bullet point summary of the FFCRA .

The CARES Act is 880 pages long and consists of numerous divisions, titles and subtitles. Below are some key provisions of the CARES Act focusing on group health plans and other employee benefit plans. We will also briefly touch on certain aspects of the broader economic stimulus.

A. Group Health Plan Provisions

- ***All*** telemedicine is now fully compatible with a high deductible health plan (HDHP) and health savings accounts (HSAs) and may be provided with no cost sharing without endangering an individual's HSA eligibility. The prior need to charge fair market value for a telemedicine consult hindered adoption of telemedicine under the HDHP/HSA plan design. This provision is designed to sunset and will only apply to HDHP plan years beginning on or before December 31, 2021. Also this has implications beyond general telemedicine and would extend to services such as virtual monitoring of chronic conditions.
- The Affordable Care Act barred the reimbursement of over the counter expenses from Health Flexible Spending Accounts (FSAs), Health Reimbursement Arrangements (HRAs) and HSAs. These expenses, along with menstrual care products can now be reimbursed, effective January 1, 2020 without a prescription.
- The CARES Act expands testing and coverage of COVID-19 without cost sharing. Previously the FFCRA required waiving all cost sharing for certain FDA approved tests but the CARES Act expands the testing that must be covered without cost sharing.
  - Also any "qualifying coronavirus preventive service" must be covered without cost sharing which should ultimately cover vaccines/immunizations that meet certain standards. Once a vaccine has a specified recommendation of the United States Preventive Services Task Force ("USPSTF") or is recommended by the Advisory Committee on Immunization Practices ("ACIP") of the Centers for Disease Control and Prevention it must be covered with no cost sharing within ***15 days.*** This is a substantially shorter period than provided by the ACA for required coverage of other newly approved preventive services.
- Don't forget that some of the change above will require amendments to underlying group health plan documents and cafeteria plan documents.

B. Retirement Plan Provisions

- A special "coronavirus-related distribution" is available in 2020 for "qualified individuals" who are diagnosed with COVID-19, have certain family members diagnosed with COVID-19, or experience certain specified adverse financial consequences related to their work because of COVID-19. Plan administrators may rely on an employee's certification that the employee is eligible for a distribution. This distribution:
  - May not exceed $100,000
  - Is not subject to mandatory 20% withholding but 10% withholding will apply unless the individual elects out of withholding
  - Is includable in taxable income ratably over a three year period or, at the election, of the individual, can be treated as taxable in the year of distribution
  - Is exempt from the 10% early withdrawal penalty
  - Can be repaid over a three year period without regard to contribution limitations and the repayment will be treated as a rollover pursuant to a trustee to trustee transfer. It is unclear how individuals who make repayments will claim a refund of the taxes they previously paid on the distribution

- Plan Loans
  - For a period of 180 days following enactment of the CARES Act, plan loan limits are increased to the lesser of $100,000 or 100% of the individual's vested account (as compared to the existing limit of the lesser of $50,000 or 50% of the individual's vested account).
  - Plan loan repayments that come due between enactment and December 31, 2020 may be suspended. Payments can then be re-amortized.
  - The plan loan provisions are applicable only for qualified individuals as described above for coronavirus-related distributions.
- Required minimum distributions for 2020 can be suspended for certain qualified retirement plans (primarily defined contribution plans and IRAs) including individuals who turned 70 ½ in 2019.
- Most of these retirement plan provisions are permissive. For example, it does not appear that a plan must provide for a coronavirus-related distribution and even if provided the amount can be set to less than $100,000. The provision extending repayment of any outstanding loan, however, appears to be required. Plan amendments are needed to implement these provisions but may be adopted retroactively if done by the last day of the first plan year beginning on or after January 1, 2022 (i.e. December 31, 2022 for a calendar year plan).
- **The CARES Act amends** Section 518 of the Employee Retirement Income Security Act (ERISA) to allow the Department of Labor (DOL) to postpone certain ERISA filing deadlines for a period of up to one year in the case of a public health emergency. This applies to both retirement and group health plans. For example, the DOL could potentially extend the time for filing documents such as the annual Form 5500 filing. Employers should expect additional guidance from the Department of Labor regarding what items it elects to delay.

C. <u>Other Provisions</u>
In addition to the provisions for group health plans and retirement plans, the CARES Act provides several tax provisions that businesses across a broad spectrum of industries will find to be helpful. Keep in mind that certain eligibility criteria will apply and some of the tax provisions only apply to certain industries (e.g, hospitality). These tax provisions are substantial in nature. As such, tax advisors should be consulted.

- Employee Retention Credit: the CARES Act provides eligible employers (including tax-exempt entities but not governmental entities) with a refundable payroll tax credit of up to 50% of the first $10,000 of wages (up to a potential net credit of $5,000 per employee) paid to an employee for periods during which the business operations are closed or partially suspended due to the COVID-19 pandemic. In order to be eligible for the refundable credit, employers must have been carrying on a trade or business during 2020 and satisfy either of the following requirements: 1) have business operations fully or partially suspended operations due to orders from a governmental entity limiting commerce, travel, or group meetings; or 2) experience a significant decline in gross receipts compared to the prior year. For the decline to be significant, gross receipts for a current quarter must be less than 50% of gross receipts for the same quarter in the prior year. An employer will continue to experience a significant decline and qualify for the credit until the quarter following the quarter when gross receipts exceed 80% of the prior year quarter. Note that family or sick leave wages paid out under the FFCRA do NOT qualify here as wages for purposes of the employee retention credit. Qualified wages for eligible employers that averaged 100 or more full-time employees during 2019 are those wages paid to employees when employees are not working or performing services for the employer due to items 1 and 2 above. Qualified wages for eligible employers with an average of 100 full-time employees or less in 2019 are all wages paid to employees during the period of time the employer is required to fully or partially suspend its business or experiencing a significant decline in gross receipts (without regard to whether an employee is still able to provide services).
- Delay of Employer Payroll Taxes: The CARES Act allows employers and self-employed individuals to postpone the due date for payment of employer payroll taxes related to Social Security and Railroad Retirement for wages paid during 2020. The deferred amounts would be payable over the next two years – half due December 31, 2021, and half due December 31, 2022.

- Direct Payments to Individuals: Under the CARES Act, taxpayers will receive up to $1,200 for individuals and up to $2,400 for couples filing joint tax returns in the form of an advance refundable tax credit.
  - Specific amounts:
    - Filed individually and making less than $75,000: $1,200
    - Filed jointly and making less than $150,000: $2,400
    - Filed as head of household and making less than $112,500: $1,200
    - Families will also receive an additional $500 per child
    - If earning above these amounts then the direct payment will decrease until individuals earning $99,000 filing individually or $198,000 filing jointly receive nothing, even if they have children
  - An individual must have a Social Security number to be eligible for a payment.
  - It is still not entirely clear when amounts will be available. The Treasury Department indicated "within three weeks" for direct deposits, which would be around April 18th. Paper checks could take longer, possibly much longer.
  - The Treasury Department will use the information on 2019 tax returns (or 2018 tax returns if an individual has not filed for 2019) to determine eligibility and amount of the payment, where to send the payment and the manner of disbursing the payment (direct deposit or check).
  - The payment is not taxable.
  - There is just a single payment, for now, although some congressional leaders have suggested future legislation with an additional payment or payments.
- Student loan repayments: Certain student loan repayments made by employers for their employees will be tax free.
  - The tax-free status is pursuant to an expansion of the definition of educational assistance in Section 127 of the Internal Revenue Code (Code).
    - The maximum tax-free exclusion under Code Section 127 is $5,250
  - To be tax-free the loan repayment must be made between the date of enactment and December 31, 2020 and must be for the employee's student loan (not the employee's spouse or children).
  - The payment can be made to the employee or the lender.